

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

R'DORION H.,

Claimant,

and

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH No. 2011070830

DECISION

This matter came on for regularly scheduled hearing on October 10, 2011, at Santa Ana, California, before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. The Regional Center of Orange County (Service Agency or RCOC) was represented by Paula Noden, Manager, Fair Hearings. Claimant R'Dorion H. was represented by his mother, Latrina H., who was assisted by Twanda H., Claimant's grandmother.¹

Evidence was received by documents and testimony. The record was closed and the matter was submitted for decision on October 10, 2011.

ISSUE

The parties agreed that the following issue is to be resolved:

Is Claimant eligible to receive services from the Service Agency?

¹ Initials are used to maintain privacy for Claimant and his family.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Claimant was born in June 2007 and is four years old. He received Early Start services from the Eastern Los Angeles Regional Center (ELARC), including physical therapy, occupational therapy, behavioral interventions and social/emotional therapy. Early Start services end at age three, and ELARC determined that he was not eligible for further services under the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4400 et seq.; referred to as the Lanterman Act).² In November 2010, Claimant was found eligible for special education services by the La Habra City School District (School District). In March 2011, Claimant's mother requested that Claimant be re-assessed for eligibility for RCOC services. He claims to be eligible because he suffers from autism.

2. In a Notice of Proposed Action dated June 29, 2011, the Service Agency notified Claimant that he was not eligible for services.

3. Claimant's mother submitted a request for Fair Hearing dated July 15, 2011, and this hearing ensued. She also signed a waiver of time limits.

4(a). Various statutes and regulations relating to eligibility apply to Claimant's request for services. Although there are five developmental disabilities that would make someone eligible for services, this Decision will examine autism as the eligible condition. As applicable to this case, section 4512, subdivision (a), states: " 'Developmental disability' means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include . . . autism, . . . but shall not include other handicapping conditions that are solely physical in nature."

4(b). As relevant here, California Code of Regulations (CCR), title 17, section 54000, defines "developmental disability" as a disability attributable to autism that originates before age 18, is likely to continue indefinitely, and constitutes a substantial handicap. Excluded are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or disabilities that are solely physical in nature.

5. In summary, Claimant's mother contends that Claimant suffers from autism and is eligible for services. The Service Agency contends that Claimant may suffer other conditions, including sensory processing disorder, allergies and chronic congestion, but does not have a diagnosis of autism and is not eligible for services.

6(a). A base level understanding of autism will help place in context the evidence of Claimant's behaviors, test scores, evaluations and diagnoses.

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

6(b). The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association; also known as DSM-IV-TR) is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. The DSM-IV-TR criteria for Autistic Disorder³ are in Exhibit 16. The ALJ takes official notice of other portions of the DSM-IV-TR, as noted below, to fully explain the disorder.

7. According to the DSM-IV-TR, the features of autism are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. It can differ greatly from person to person. There is no definitive test for it; rather, the list of symptoms and behaviors is an attempt to collect and categorize the known features into a workable diagnostic reference tool. To support a diagnosis of autism requires a review of 12 different symptoms or behaviors and a conclusion that at least six are present; however, the six or more symptoms or behaviors must include the following:

(a) at least two of the four behaviors referred to as qualitative impairments in social interaction, which must be gross and sustained;

(b) at least one of the four behaviors referred to as qualitative impairments in communication, which must be marked and sustained and affect both verbal and nonverbal skills; and

(c) at least one of the four behaviors referred to as restricted, repetitive and stereotyped patterns of behavior, interests, and activities.

8. Many reports, records and assessments were submitted in evidence, some of which are more significant than others. There are numerous medical records, as far back as August 2007, when Claimant was 45 days old, relating to medical issues such as respiratory infections (Exhibits 14, C, J and M) as well as constipation and other gastroenterological disorders (Exhibits B, D, P, 2, E, F, G, H, I, K, and N). As part of ELARC's evaluation and services, Claimant was evaluated by Renee Kim, Psy.D., on October 10, 2008, for his social/emotional functioning due to reported concerns of frequent tantrums, aggressive behaviors, and high activity level. In her report (Exhibit 13), Dr. Kim set forth background information and history, a summary of prior evaluations, her observations of Claimant and the results of the tests she administered. According to Dr. Kim, Claimant displayed significant regulation difficulties, including difficulty engaging in an activity for an extended period of time, bumped into objects, and had low frustration tolerance. Claimant exhibited aggression and defiance, impulsivity and peer aggression. Dr. Kim's diagnosis was Regulation Disorders of Sensory Processing: Hypersensitive, Type B: Negative/Defiant. She recommended

³ The statute listing eligible conditions uses the word autism (see Factual Finding 4), while the DSM-IV-TR uses the phrase autistic disorder. For purposes of this Decision, they are interchangeable.

intervention services to improve his regulation skills, training for Claimant's mother, occupational therapy, and medical monitoring for nasal congestion.

9. Occupational therapy and physical therapy services were provided, and progress reports (Exhibits 11 and 12) indicated that some goals were being met, but that Claimant had significant delays in self-care skills, and sensory processing difficulties leading to tantrums and other negative behaviors.

10(a). To determine if Claimant was eligible for services under the Lanterman Act after he reached age three, ELARC arranged for a psychological evaluation by Randi Bienstock, Psy.D., when Claimant was age two years, nine months. Dr. Bienstock's report, dated March 31, 2010 (Exhibit 10), includes information gathered from prior reports, interviews with Claimant's mother and grandmother, clinical observation and administration of tests. On the ultimate question of whether Claimant has autism, Dr. Bienstock wrote: "The overall results indicate that R'Dorion does not exhibit the hallmark characteristics or symptoms that would warrant concerns related to a diagnosis of Autistic Spectrum Disorder." (Exhibit 10, p. 11.) She made a diagnosis of Sensory Processing Disorder, reported allergies, and reported problems with chronic congestion.

10(b). Dr. Bienstock noted that an initial physical therapy evaluation dated July 10, 2009, referred to excessive toe walking, moderate muscle weakness, and problems with balance and stability. The physical therapist concluded that Claimant's developmental delays were a function of a regulatory processing disorder. Claimant's history included chronic ear infections, severe congestion requiring hospitalizations and suctioning in the emergency room, many allergies by parent report but with no record of allergy testing, problematic sleeping patterns, difficulty in chewing and swallowing that lead to choking, lack of safety awareness, and problems with sensory processing. Of particular note was the family's reports of Claimant's lengthy and extreme tantrums. Although Dr. Kim's report was not available for her review, Dr. Bienstock noted that behavioral therapy was started but was ended because it was ineffective as Claimant did not display negative behaviors in therapy. Claimant expressed interest in social interaction, but had difficulty sharing toys, was aggressive with peers, and needed constant supervision. Although Claimant's play was rough, Dr. Bienstock noted that he played with toys in a functional and pretend manner, did not exhibit significant idiosyncratic play, and although he would sometimes line up his toys, he did not do so frequently and exhibited no other repetitive or restricted patterns of play. As for stereotypical or idiosyncratic behaviors, it was noted that Claimant had a tendency to rub the noses of family members for self-comfort.

10(c). Dr. Bienstock administered several standardized tests, some of which are summarized as follows. The Temperament and Atypical Behavior Scales measure atypical behavior; Claimant had difficulty modulating his neurophysiological patterns, such as eating and sleeping, and showed significant sensory related issues. Because many children with these deficits may also exhibit symptoms of Autistic Disorder, Dr. Bienstock administered the Autism Diagnosis Interview-Revised (ADIR), which is a directed interview of Claimant's mother and grandmother. Claimant obtained the following scores: Communication = 0 (cutoff = 7);

Reciprocal Social Interaction = 3 (cutoff = 10); and Stereotyped Patterns of Behavior = 1 (cutoff = 3). Dr. Bienstock did not believe that Claimant met the criteria for a diagnosis of Autistic Disorder.

10(d). Dr. Bienstock administered the Mullen Scales of Early Learning, and concluded that Claimant's cognitive skills were within the average range, with strength in memorization. Expressive and receptive language were within age expectations, although it was noted that Claimant used short phrases and had mild articulation errors, but with no idiosyncratic language patterns. No issues were noted concerning fine motor skills. Adaptive functioning was assessed by use of the Vineland Adaptive Behavior Scales, indicating that Claimant's sensory issues and subsequent behaviors were affecting his self-help / daily living skills, with specific reference to toileting. He lacked safety awareness and, due to impulsiveness, required constant attention. Continued occupational therapy and behavioral interventions were recommended. Social development included the need for prompts and boundaries to sustain his attention. He was socially engaging and liked to be near other children but did not share toys well and often fought with peers. Mild articulation problems were observed, and Claimant was slightly clumsy.

10(e). In her summary, Dr. Bienstock noted that Claimant's occupational therapist noted in a December 2009 progress report that Claimant had problems with sensory processing including a low threshold and hypersensitivity to auditory, tactile, oral, and vestibular sensory input, resulting in distractibility, disorganization, and tantrum behaviors. Also noted was Claimant's need for constant movement, limited attention, and feeding issues.

10(f). Dr. Bienstock's evaluation is complete and comprehensive, relying on prior reports and testing, observation of Claimant, structured interviews and testing with Claimant, his mother and grandmother, and consistent and probative analysis of the findings to support her conclusions.

11(a). After ELARC found that Claimant was not eligible for services as of age three (Exhibit 9), Claimant's mother commenced the process of having him evaluated by his School District. The report of that psychoeducational assessment is dated September 14, 2010 (Exhibit 8). It was prepared by Trang Trotter, a school psychologist who has a Masters of Science degree. The report includes a short history and reference to prior testing, including Dr. Kim's report, but no reference is made to Dr. Bienstock's report. Mr. Trang assessed Claimant over five testing sessions. On the Developmental Profile-3, Claimant's adaptive behavior standard score of 66 was in the delayed range, and his social-emotional standard score of 78 was in the below average range.

11(b). The Gilliam Autism Rating Scale-Second Edition (GARS) was given to Claimant's mother, with the result that Claimant was in the "very likely" probability range with an autism index of 122. Various stereotyped behaviors were noted, such as he avoided eye contact, ate specific foods and avoided others, licked inedible objects (e.g., his mother's nose), whirled in circles, made rapid lunging movements, flapped hands or fingers, made high-pitched

sounds and slapped his face. In the area of communication he repeated words, often out of context, responded inappropriately to commands, looked away when his name was called, used pronouns inappropriately, repeated unintelligible sounds and used gestures to obtain objects. In the area of social interactions, Claimant frequently resisted physical contact from others, behaved in an unreasonable frightened manner, laughed, giggled and cried inappropriately, became upset when routines were changed, and responded with temper tantrums.

11(c). The Autism Diagnostic Observation Scale (ADOS) was administered, yielding the following results:

Communication = 3 (autism cutoff = 3; autism spectrum cutoff = 2)
Social Interaction = 9 (autism cutoff = 6; autism spectrum cutoff = 4)
Communication + Social Interaction = 12
(autism cutoff = 10; autism spectrum cutoff = 7)
Stereotyped behaviors / restricted interests = 1

11(d). Other test results of note are that, on the basic Assessment System for Children-Second Edition, Claimant's mother tended to rate him negatively; hyperactivity; threatens and hits others; and argumentative. On the Internalizing Problems Composite, he exhibited anxiety and depression. On the Behavioral Symptoms Index there were significant levels of atypicality, withdrawal and attention problems. On the Adaptive Behavior Composite, he was in the at-risk range for daily living skills and adaptive skills, and in the average range for social skills and functional skills. On the Brown Attention-Deficit Disorder Scales, Claimant was in the significant problem range in areas of activation, emotion, and memory. Measured by the Developmental Profile II, Claimant's communication was in the low average range, gross and fine motor skills were in the low average range, and academic skills were in the average range.

11(e). Mr. Trang's report sets forth the applicable requirements for eligibility for special education services, discussed in more detail below, and found that Claimant was eligible as exhibiting autistic-like behaviors, noting the results of the ADOS and the GARS. Mr. Trang referred to a separate speech and language evaluation (Exhibit 7) and found that Claimant was also eligible for special education services as a student with exceptional needs due to a language or speech disorder.

12(a). The criteria related to eligibility for special education services from a school district are under the category of autistic-like behaviors and are found in the Education Code and related regulations. Under CCR, title 5, section 3030, subdivision (g), eligibility for special education services exists if a pupil exhibits "*any combination* of the following autistic-like behaviors," followed by a list of seven numbered criteria. (Emphasis added.) The seven criteria are:

"1. An inability to use oral language for appropriate communication." (There follows a list of four sub-items that are the same as the DSM-IV-TR autism factors in the section on qualitative impairments in communication.)

“2. A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.” (There follows a list of four sub-items that are the same as the DSM-IV-TR autism factors in the section on qualitative impairments in social interaction.)

“3. An obsession to maintain sameness.

“4. Extreme preoccupation with objects or inappropriate use of objects or both.

“5. Extreme resistance to controls.

“6. Displays peculiar motoric mannerisms and motility patterns.

“7. Self-stimulating, ritualistic behavior.”

12(b). This regulation contains substantially fewer requirements to be satisfied (i.e., any two or more of the seven listed) for someone to receive special education services for exhibiting autistic-like behaviors as compared to the number of requirements under the DSM-IV-TR to be diagnosed as autistic and receive services from the Service Agency.

13. In his report, Mr. Trang concluded that Claimant met the following criteria from this regulation: an inability to use oral language for appropriate communication (criterion 1); a history of extreme withdrawal or relating to people inappropriately (criterion 2); an obsession to maintain sameness (criterion 3); and extreme resistance to controls (criterion 5).

14. Dr. Kyle Pontius testified at the hearing. Based on his education, training and experience, Dr. Pontius was qualified to give the expert opinions contained in his testimony. Dr. Pontius reviewed the prior test results, reports and evaluations, but did not personally evaluate Claimant. Dr. Pontius also explained that, in his experience, school districts use broader criteria to find eligibility for autistic-like behavior and do not require a diagnosis that meets the more rigorous criteria of the DSM-IV-TR to support a diagnosis of autistic disorder. He noted that Mr. Trang did not have the type of degree or license that would allow him to make a diagnosis of Autistic Disorder, and may not necessarily have had the type of training recommended by the creators of the ADOS for it to be properly administered and scored. Dr. Pontius also noted that the degree and level of behaviors engaged in by the person being evaluated are significant in determining whether a developmental disability amounts to a substantial disability for that person for purposes of eligibility for regional center services. It was Dr. Pontius's opinion that Claimant did not demonstrate a developmental disability and was not substantially handicapped by his conditions. Other aspects of Dr. Pontius's testimony are discussed below.

15. The School District speech and language evaluation (report dated November 9, 2010; Exhibit 7) noted that Claimant's mother was interviewed and various tests were administered to Claimant. Articulation development was not considered an area of need.

Receptive and expressive language was in the average range. Pragmatic language development was in the significantly delayed range.

16. The School District developed an Individualized Education Program (IEP) for Claimant on November 9, 2010 (Exhibit Q), which indicated that he was eligible for special education services based on autism and speech and language disability. However, the “meeting comments” section noted that his eligibility was as a child with autistic like behaviors and pragmatic language delays.

17. Included in the evidence is a page from a prescription pad dated December 4, 2010, by Teresa Tincopa, a Registered Nurse and Certified Family Nurse Practitioner (Exhibit O), which stated that Claimant has autism and is being sent to an allergist for assessment before receiving further vaccines due to a prior allergic reaction to receiving vaccines. There was no testimony or other evidence to explain this document, including whether the reference to autism was based on independent testing and evaluation or based on family report.

18. RCOC service coordinator Michele Aquino interviewed Claimant, his mother and grandmother on April 1, 2010, and prepared a social assessment (Exhibit 6). Among the significant items in this assessment are: Claimant’s eye contact was fleeting and he averted gaze or looked at the speaker’s face rather than making eye contact; he sometimes used single words that were unintelligible; Claimant spontaneously brought a book and complied with an instruction to show it to his grandmother; he controlled an activity with letter flash cards; and he was observed to often hold or touch the nose of his mother or grandmother while drinking from a sippy cup. Several other reports and evaluations were noted. With respect to toileting, Claimant used a diaper and would sometimes not have a bowel movement for as long as seven days, and the family would administer medication to assist in the bowel movement. Claimant was resistive to toilet training. Numerous concerns are listed under the category of “social / behavioral / emotional,” most of which are noted elsewhere in this Decision. There is notation of his tantrums or meltdowns, sometimes for no reason that the family can tell, other times based on not getting what he wants, transitioning to a non-preferred activity, when fearful, or being given the wrong color cup or food on the wrong part of a plate. The tantrums can last an hour or more. Also noted are Claimant’s sensitivities to various items or settings, such as clothes tags, bright lights, common household noises, as well as his lack of safety awareness. Claimant may respond inappropriately in conversation, speaking about one of his interests or by speaking obsessively in the manner of a comic book movie character.

19(a). The Service Agency reviewed the documents submitted and referred the matter to its eligibility team for a decision on eligibility. As noted in the eligibility review document (Exhibit 2), the team decided that Claimant was not eligible, with the following significant comments: Dr. Pontius noted there was special education eligibility for autistic-like behaviors, but the psychological evaluation in March 2010 (Dr. Bienstock, exhibit 10) instead included a diagnosis of regulation disorder of sensory processing. Also the social assessment (Exhibit 6) noted behaviors that were not characteristic of autism, but more likely a severe disruptive behavior disorder. Further, Claimant was not substantially disabled in a minimum of three of

the areas of major life activity (this is required by the regulation discussed in Conclusion 3 below).

19(b). A registered nurse on the team noted that, although there was a seizure-like event at three weeks old, there was no diagnosis of seizure (epilepsy) or cerebral palsy (both of which are other eligible conditions for Lanterman Act services).

19(c). Arleen Downing, M.D., noted there was a note from gastroenterologist Robert H. Tran, M.D., in February 2011 stating that Claimant had autism, but there was no medical record to review, and that Claimant's regular pediatrician had not made a diagnosis of autism. (The record of Dr. Tran from February 2011 was not in evidence at the hearing.)

19(d). On the issue of whether Claimant was disabled in the required areas of major life activity, the team decided he was disabled as to self-care and self-direction, but was not disabled as to receptive / expressive language, learning and mobility. The remaining two areas (capacity for independent living and economic self-sufficiency) were deemed inapplicable to Claimant due to his age.

20. After the Service Agency notified Claimant's mother that eligibility was not found, and the Fair Hearing Request was filed, there was an informal meeting and the Service Agency agreed to schedule a further assessment of Claimant. (Exhibit 5.) An assessment was scheduled to be performed by a psychologist and a physician, and Claimant's family was notified of the appointment; however, the assessment did not take place as scheduled. (Exhibits 4 and 19.) Claimant's grandmother testified that, although the service coordinator called her and told her of the appointment, the grandmother did not feel she could commit to it and it was up to Claimant's mother to agree. There was no evidence of whether the grandmother told Claimant's mother of the appointment, or why there was no response to the service coordinator's voice mail reminder left the day prior to the appointment.

21. Testimony was received from Peter Himber, M.D., RCOC's Chief Medical Officer, who has extensive experience and training concerning childhood developmental disabilities. Dr. Himber had reviewed Claimant's chart and had advised members of the eligibility team. In Dr. Himber's opinion, Claimant demonstrates some behaviors typical of someone with autism, but is missing key features, without which the diagnosis can not be made. Dr. Himber was comfortable with the decision to deny eligibility, but was willing to perform the assessment discussed at the informal meeting, which was then scheduled but did not take place. Dr. Himber was aware that gastroenterologist Dr. Tran had written that Claimant has autism (see Finding 19(c)), but there was no indication of the basis of this statement, and whether it was based on any testing or formal assessment. In Dr. Himber's opinion, Claimant does not suffer from an eligible condition, does not meet the definition of substantial disability, and his condition is not likely to last a lifetime.

22. Dr. Pontius testified to his involvement in the eligibility decision, and explained that no new evaluation of Claimant was made because there was already sufficient information

to make a knowledgeable decision. As noted above, Dr. Pontius explained his understanding of the nature of the School District's testing and requirements for special education services, and that a lot more is required to make a diagnosis of Autistic Disorder under the DSM-IV-TR, which is the type of diagnosis required by the Service Agency to find eligibility for Lanterman Act services. Dr. Pontius agreed that the information in Dr. Bienstock's report (Exhibit 10) did not support a diagnosis of Autistic Disorder. Further, the prescription slip from nurse Tincopa (Exhibit O) had no information to support the reference to autism and was, therefore, of limited value. Best practices are for a physician or psychologist to make that diagnosis. Dr. Pontius believed Claimant was substantially disabled in the major life area of self-direction, and although there are some challenges in the area of self-direction, he did not see this, or any other major life area, as a substantial disability for Claimant. He also believed, due to Claimant's progress with physical and occupational therapy, that his conditions may not be life long. When asked if Claimant could have regressed since the time that many of the evaluations and reports were prepared, Dr. Pontius opined that many of the test results and diagnoses were consistent with each other and that there was little likelihood of regression.

23. Claimant's mother testified about many of the behaviors, characteristics and challenges presented by Claimant. She compared the diagnostic criteria for Autistic Disorder from the DSM-IV-TR (Exhibit 16) to information contained in some of the reports and evaluations to conclude that there was evidence to support a diagnosis of Autistic Disorder. For example, she cited the RCOC social assessment (Exhibit 6), the School District speech and language evaluation and Psychoeducational Report (Exhibits 7 and 8), and Dr. Bienstock's report (Exhibit 10), as containing evidence that Claimant met criteria for qualitative impairments in social interaction and communication, and exhibited restricted, repetitive and stereotyped patterns of behavior, interests, and activities. In this manner, she was able to use selective observations and results to match up with some of the diagnostic criteria.

24. Claimant's grandmother testified to the food allergies and behavioral challenges of Claimant (Exhibits M and S), as well as his bowel and toileting issues, and the emotional effects on Claimant and his mother. Claimant's grandmother has many years of experience in child care management and child care and has never experienced a child with as many issues and requirements for assistance.

25. The preponderance of the evidence submitted supports the Service Agency's decision to deny eligibility for Claimant to receive services. Claimant has not established that he is eligible to receive services.

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CONCLUSIONS OF LAW AND DISCUSSION

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following conclusions of law and determination of the issue:

1. Throughout the applicable statutes and regulations (sections 4700 - 4716, and CCR, title 17, sections 50900 - 50964), the state level fair hearing is referred to as an appeal of the regional center's decision. Particularly in this instance, where Claimant seeks to establish his eligibility for services, the burden is on the appealing Claimant to demonstrate that the Service Agency's decision is incorrect.

2. To answer the question of Claimant's eligibility requires a review of the applicable statutes and regulations, and the relationship of the evidence to them. Several requirements must be met. Several steps of analysis might be needed.

3. Section 4512 lists specific categories for possible eligibility, including autism. The statute also requires that the condition must constitute a substantial disability to that individual. See Factual Finding 4. The following provisions of CCR, title 17, section 54001, subdivision (a), define "substantial disability" for purposes of eligibility.

"(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

"(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency."

4. There have been numerous tests, evaluations, assessments and reports relating to Claimant. Numerous factors have been identified and discussed which may legitimately play a part in the determination of whether Claimant suffers from a developmental disability. Some results are consistent and clear, while others appear to be preliminary or have not been supported by other evaluations.

5. The first report to indicate a likelihood of autism is the School District Psychoeducational Report. However, the conclusions of this report are entitled to limited weight, for the following reasons. The requirements to qualify for special education services are substantially fewer than those required for eligibility under the Lanterman act. It is unknown what qualifications are held by Mr. Trang other than a Masters of Science degree. Mr. Trang did not make a diagnosis of autism; rather, he found the presence of autistic like behaviors sufficient to be eligible for special education services. The assessment performed by Mr. Trang was not performed using the criteria of the DSM-IV-TR. Nor was Mr. Trang aware of Dr. Bienstock's comprehensive evaluation from six months earlier. Further, following Mr. Trang's report, there are two references to autism, one by nurse Tincopa and the other by Dr. Tran, a gastroenterologist. However, neither of these is based upon formal testing and evaluation and no back up records were submitted to be able to evaluate the validity of these conclusions. See Factual Findings 4 through 25.

6. The language used in the DSM-IV-TR section on autistic disorders requires some of the factors listed to be "gross and sustained," meaning that it is obvious and noticeable over time. The behavior must be of clinical importance. The DSM-IV-TR specifically states that some behaviors must be a "qualitative impairment" or a "marked impairment." Therefore, behaviors must be evaluated by those who, by their training and experience, are qualified to determine whether those behaviors are clinically significant and would or would not support the diagnosis.

7. The task of the evaluator is to assess the patient globally—the entire presentation of the child—based upon the information presented and the observations made. If a behavior found positive by one evaluator is either not present or is not significant when the patient is observed a second time, that behavior may not have been found to be clinically significant and may be of less importance to the second evaluator. Further, the diagnosis of autism should not reasonably be made by taking piecemeal the diagnostic criteria found by one evaluator and adding to that the diagnostic criteria found by another evaluator, as this would not amount to a global and singular assessment and the criteria may not meet the requirement of "qualitative" or "marked" impairment or be "gross and sustained" if not evident in multiple assessments. For example, Dr. Bienstock's history included reference to behavioral therapy instituted due to Claimant's behaviors with his family, yet terminated when Claimant did not exhibit the same behaviors with the therapist. The inference is that some of these behaviors were situational and not present when Claimant was in another setting.

8. The DSM-IV-TR notes that it was developed for use in clinical, educational and research settings and is designed for use by those with appropriate training and experience, including a specialized body of knowledge and clinical skills. It should not be applied mechanically or in a cookbook fashion, and the diagnostic criteria "are meant to serve as guidelines to be informed by clinical judgment," which might be used to justify a diagnosis even if all criteria are not met, as long as the symptoms are close, persistent and severe. It also stresses the importance of collecting data in a manner such that it is valid and sufficient to aid in making any diagnosis.

9. Claimant's mother was critical of the Service Agency relying on Dr. Bienstock's report, which was more than a year old and yet Claimant's mother also relied on that report, and earlier information, to spotlight the particular behaviors and criteria that she believed meet the DSM-IV-TR criteria. Dr. Bienstock's report was a good source of information, and the trained professional who prepared it did not find that the diagnostic criteria were met.

10. There is a consistent theme to the various reports and evaluations in evidence; that is, diagnoses of sensory or regulatory processing disorders. This begins as early as Dr. Kim's report (Exhibit B, October 2008), and includes the physical and occupational therapy progress reports (Exhibits 11 and 12, December 2009 and January 2010), reference in Dr. Bienstock's report to an earlier physical therapy evaluation, and Dr. Bienstock's report itself (Exhibit 10, March 2010). The different professionals involved in preparing these reports all list the factors that support their conclusions, and these same factors are listed in other evidence as well. The diagnoses seem well supported, and do not constitute a developmental disability that would make Claimant eligible for RCOC services under the Lanterman Act.

11. The preponderance of the evidence submitted favors the Service Agency's decision to deny eligibility for Claimant to receive services. The Service Agency's interpretation of the laws and regulations regarding eligibility, and application of them to Claimant, was not proven to be unreasonable or arbitrary.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Claimant has not established his eligibility for services. The Claimant's appeal of the Service Agency's determination that he is not eligible for services from the Service Agency is denied.

DATED: October 14, 2011.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

Notice: This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

